No. 95-1201

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ and DAVID SERENA,
Appellants,
v.
MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Appellees,
STEPHEN A. SILLMAN,
Intervenor-Appellee.

On Appeal from the United States District Court for the Northern District of California

MOTION TO DISMISS OR AFFIRM OF INTERVENOR STEPHEN A. SILLMAN

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in his Official Capacity
as Presiding Judge of the
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QUESTIONS PRESENTED

In an action under section 5 of the Voting Rights Act, challenging unprecleared court consolidations which occurred after November 1, 1968, the date a jurisdiction became subject to section 5,

1. Was it error for the Three-Judge Court to refuse to extend its prior interim remedial election plan, and the judicial elections held thereunder, after the plan's drafters informed the court that the plan was solely motivated by race?

2. Was it error for the Three-Judge Court to order, on a one time basis only, at-large judicial elections in the unprecleared consolidated court, when substantial issues on the merits remained unresolved in the Three-Judge Court and the subject of ongoing proceedings, a return to the pre-1968 multi-court system was infeasible, and the prior interim remedial election plan proposed by Appellants and Appellee County, but ordered into effect by the court, was a plan conceded to be solely race-based?

3. Should this Court exercise jurisdiction over an appeal from an interlocutory order of the Three-Judge Court authorizing at-large judicial elections in the unprecleared consolidated court, when substantial issues on the merits remain unresolved in the Three-Judge Court, and ongoing proceedings below have the potential to moot this appeal?

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STATEMENT OF JURISDICTION.

Appellants have alleged jurisdiction under 42 U.S.C. § 1973c and 28 U.S.C. § 1253 to review an interlocutory order of a Three-Judge panel of the United States District Court for the Northern District of California entered on November 1, 1995 modifying a prior injunction entered on December 20, 1994. *Lopez v. Monterey County*, 871 F. Supp. 1254 (N.D. Cal. 1995). (J. S. App. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND FEDERAL REGULATIONS.

Fourteenth Amendment to The Constitution of the United States
42 U.S.C. § 1973c (J. S. App. 85)
28 C.F.R. § 51.54 (J. S. App. 87)

INTEREST OF INTERVENOR.

Intervenor, Stephen A. Sillman, is the Presiding Judge of the Monterey County Municipal Court. Under the California Rules of Court, the Presiding Judge is responsible for all aspects of the timely, efficient and effective administration of justice by the court. Cal. Rules of Court 532.5 and 532.6 (Deering 1995).

Judge Sillman requested intervention in response to the interim remedial injunctive orders entered by the Three-Judge Court on December 20, 1994 and January 10, 1995. These orders established a temporary election division plan for the Municipal Court and an election schedule affecting eight of the Municipal Court's ten judges and requiring them to campaign for election in potentially a total of twenty-one primary and runoff elections in the following seventeen months. Judge Sillman believed that the time demands placed on the court's judges to campaign and fundraise for this number of elections in such a short period of time would be a substantial drain on the court's resources and severely burden its ability to adjudicate cases in a timely fashion, thus potentially affecting the constitutional and other rights of litigants. Accordingly, Judge Sillman sought intervention for the limited purpose of 1) requesting that the Three-Judge Court modify its orders and 2) participating in future proceedings concerning the potential effect of proposed remedies on the official duties of the Municipal Court.[1]

Judge Sillman was granted intervention on April 13, 1995 in his official capacity as Presiding Judge of the Monterey County Municipal Court "to protect the administration of justice in Monterey County."

MOTION TO DISMISS OR AFFIRM.

Judge Sillman believes that federal court interference in the organization and administration of the Municipal Court is not warranted until all aspects of the fundamental issue of liability under section 5 have been decided by the Three-Judge Court. Accordingly, in keeping with the purpose of his intervention, Intervenor moves to dismiss this appeal or affirm the Three-Judge Court's November 1, 1995 Order. This motion is made on the grounds that the issue of liability under section 5 has been reopened in the Three-Judge Court and is subject to ongoing proceedings in the lower court. At least until the predicate question of liability has been determined, a reorganization of the Municipal Court is not warranted. These ongoing proceedings also may moot the issues pending in this Court. Moreover, the Three-Judge Court's decision to refuse to continue in effect an interim remedial electoral division plan, after its drafters conceded that the plan was solely motivated by race, and to permit one-time remedial elections to be held in the unprecleared consolidated municipal court, was not an abuse of discretion.

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[1] Intervenor Sillman has briefed other matters only pursuant to court order. (See App. 38a.)

STATEMENT OF THE CASE.

This is a lawsuit to enforce section 5 of the Voting Rights Act. Appellee, Monterey County (defendant below), became subject to section 5 as of November 1, 1968. Appellants allege that the County failed to obtain preclearance of numerous County ordinances enacted between 1972 and 1983 resulting in the consolidation of nine individual municipal and justice courts to form the county-wide Monterey County Municipal Court.[2] Appellants allege in this appeal that the Three-Judge Court erred in exercising its discretion to refuse to extend a prior interim election division plan when the court learned that that plan was motivated solely by race, and instead to authorize one-time elections in the consolidated Municipal Court system.

Appellants' Statement of Case omits critical facts demonstrating that the Three-Judge Court's November 1 Order was not an abuse of discretion. Appellants do not mention that the Three-Judge Court has recently joined the State of California as a defendant in this action and reopened the question of liability; that Appellants stipulated that they have not found any evidence of purposeful discrimination in the formation of the consolidated Municipal Court; that there have not been findings by any court concerning specific retrogressive effects of the consolidated Municipal Court, if any; that the Three-Judge Court specifically declined to accept the assertion by Appellants and the County that the consolidated Municipal Court was retrogressive in effect; that the County admitted at a hearing in September 1995 that a court-ordered, but County-designed electoral plan used for interim judicial elections during the prior June was solely motivated by racial considerations; and that

[2] As of November 1, 1968, there were two municipal courts and seven justice courts within Monterey County. These were separate legal entities, not districts of a single court. Some of these courts were very tiny, some were quite large. (See App. 49a & 50a.)

it is not possible to design an electoral system that complies with State law and also satisfies what Appellants believe to be the mandate of the Voting Rights Act, i.e., the creation of electoral divisions on the basis of the race of the voters.

Although the municipal courts of the State of California[3] are created in the State Constitution and governed by the State Constitution and statutes, many of which specifically concern the Monterey County Municipal Court and were enacted after November 1, 1968, the Appellants did not name the State of California as a party and did not allege that any State statute required preclearance. Appellants successfully opposed the County's motion to join the State as a defendant. Thus, on March 31, 1993 the Three-Judge Court, on cross-motions for summary judgment, ruled only that the County consolidation ordinances were subject to preclearance, which had not been obtained, and ordered the County to do so within 90 days. See *Lopez v. Monterey County*, 871 F. Supp. at 256.

On August 10, 1993, the County filed an action for a declaratory judgment in the United States District Court for the District of Columbia seeking preclearance. The County, however, voluntarily dismissed the action on October 7, 1993. No evidence was presented to the court and the court made no findings on the question of retrogression. (App. 1a.)

Thereafter, Appellants and the County requested the Three-Judge Court to approve a stipulation for an order installing an electoral division plan for the 1994 Municipal Court elections.[4] Appellants acknowledged that they had not discovered any evidence that Monterey County's adoption of

[3] The State of California is not covered by section 5.

[4] At the time, the Three-Judge Court did not know that race was the sole motivation in the design of the plan. This came to light at a hearing several months later which the Three-Judge Court held on the effect of

the consolidation ordinances had a discriminatory purpose or intent. Monterey County, however, stipulated that it was unable to establish that the consolidation ordinances did not have a retrogressive effect. (App. 4a and 12a.)

The plan also violated numerous provisions of the State Constitution and statutes. Accordingly, Appellants and the County also requested that the Three-Judge Court suspend the provisions of the State Constitution and statutes that the plan violated. (App. 5a-6a and 13a-14a.) On December 22, 1993, the State of California was granted leave to intervene to oppose the stipulation.

The Three-Judge Court declined to approve the stipulated order on the basis that "the court was not satisfied that the plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act." (App. 21a.) The Three-Judge Court ordered the County either to submit for preclearance an election plan that complied with the Voting Rights Act and State law or to show cause why it could not do so. The Three-Judge Court then "enjoined [the County] pending preclearance of a new election plan or further order of this court from holding an election for judges for the municipal court." (App. 25a.)

The County did not submit a plan for preclearance. Instead, it attempted to show cause why it was unable to do so and requested that the Court order the race-based electoral division plan into effect. The County stipulated that it was not possible to design an electoral plan that satisfied State law, as well as Appellants' view of what the Voting Rights Act required, the concentration of voters in particular divisions on the basis of race. (J.S. App. 107.) The United States Department of Justice filed a brief *amicus curiae* in

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this Court's recent decision, *Miller v. Johnson*, 575 U.S. ____, 115 S. Ct. 2475 (1995), on this case. (App. 38a.)

which it proposed as a remedy a return to the judicial system that existed prior to November 1, 1968. The Appellants and the County, however, rejected this proposal as practically infeasible and administratively unworkable. (App. 30a.)

On June 1, 1994, the Three-Judge Court again declined to approve the stipulated electoral division plan, continued in effect the injunction, and once again ordered the County to devise a plan that complied with the Voting Rights Act and State law, even if this required the County to seek amendments to the existing State law. The Three-Judge Court refused to reimpose the judicial system in effect in 1968, since "such an alternative is not a workable interim solution." (App. 30a and 32a.)

At a November 3, 1994 Status Conference, the County reported that it had been unsuccessful in securing the legislative changes necessary to develop an electoral division plan in accordance with the court's June 1 order and again requested that the Three-Judge Court implement the stipulated electoral division plan. The State objected on the ground that the racially drawn electoral division plan violated the Equal Protection Clause, among other grounds.

In an order filed on December 20, 1994, the Three-Judge Court, noting that no case cited by the State concluded that racially drawn election divisions violated the Equal Protection Clause, finally acceded to the County's and Appellants' request that the court approve the election division plan. The Three-Judge Court acknowledged that the plan violated the State Constitution and that it was not possible to return to the electoral system in effect in 1968, a remedy no party advocated, but expressed serious concern that continuance of its injunction against any elections at all deprived Monterey County voters of their constitutional right to vote. Therefore, the court ordered one-time only elections in the proposed election division plan pending the implementation of a permanent legislative solution. The Three-Judge Court

ordered that the terms of those elected would expire on the first Monday in January, 1997. *Lopez v. Monterey County*, 871 F. Supp. 1254. The Three-Judge Court ordered the County to submit the interim electoral division plan for preclearance. The County did so, and preclearance was obtained from the United States Department of Justice on March 6, 1995. (App. 35a.)

On June 29, 1995, this Court issued its decision in *Miller v. Johnson*, 575 U.S. ____, 115 S. Ct. 2475 (1995). That decision raised grave doubts about the constitutionality of the interim electoral division plan. On September 7, 1995, the Three-Judge Court ordered briefing from the parties regarding the impact of *Miller v. Johnson* in connection with a September 28, 1995 Status Conference. (App. 38a.) Although the United States Department of Justice received notice, it did not file a pre-hearing brief. (App. 39a-42a.)[5]

At the Status Conference, the Three-Judge Court conducted a lengthy hearing on the County's progress towards development of a permanent plan, on the constitutionality of the interim electoral division plan, and on remedies. The United States Department of Justice did not attend the hearing. (App. 39a-42a.)

At the hearing, counsel for the County conceded:

> I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There is no question about it. That was the *sole motivation.*

(App. 43a, emphasis added.)[6]

[5]The Department of Justice did file a brief in October after the Three-Judge Court issued a specific order requesting it do so.

[6]A full transcript is included in Intervenor's Appendix to Response to Application to Stay. See Attachment 13. Numerous other factors support the County's concession. The County and Appellants stipulated

The Three-Judge Court thus found itself confronted with an exceedingly difficult situation: the interim electoral division plan violated the State Constitution and was conceded by its drafter to be solely motivated by race, thus most likely violative of the Equal Protection Clause; return to the pre-November 1, 1968 election scheme was not feasible; the County stipulated that it was unable to devise any plan that satisfied both Appellants' racial goals and State law; the consolidated Municipal Court in effect between 1983 and 1991 had not been precleared, but the parties had stipulated that there was no evidence that the consolidation ordinances had been adopted for a discriminatory purpose; moreover, there were no findings about retrogression, only the County's stipulation that it could not prove that the consolidation ordinances did not have a retrogressive effect. Also, pursuant to the December 20, 1994 Order, the terms of those elected in June 1995 expired in January, 1997. Therefore, in order for the Municipal Court to have judges and continue to function after January 1997, the Three-Judge Court was required to exercise its equitable powers to fashion a remedy.

The Three-Judge Court had four possible options:

(1) Extend the duration of the race-based interim plan and thus continue indefinitely the terms of office of the judges elected thereunder;

to violations of the State law in order to satisfy racial percentage goals. (App. 5a-6a.) They stipulated that the electoral divisions would have no purpose other than to concentrate Hispanic voters. (App. 8a, 16a-18a.) The divisions did not correspond to the population whose cases were most likely to be heard by the judge elected in that division; residency in a division was not required in order to run for or maintain the judicial seat assigned to that division. (App. 8a.) The extraordinary configuration and demographics of the divisions reaffirm that race was the predominant concern. (See App. 51a & 52a.)

(2) Reinstitute the judicial system that was in effect prior to November 1, 1968, which no party advocated or desired as a remedy;

(3) Attempt to devise a court plan; or

(4) Order one-time remedial elections in the consolidated Monterey County Municipal Court which, although not precleared, was not created for a discriminatory purpose.

The Three-Judge Court, having been advised by the County of the exclusive racial motivation in the design of the electoral plan, chose the option which did not violate State or Federal constitutional rights, and ordered a single county-wide election of Municipal Court judges in the general election in 1996, but enjoined elections thereafter pending preclearance of a permanent plan. (J. S. App. 8.)

On the issue of retrogression, the Three-Judge Court noted that there was no evidence of purposeful discrimination and that it did not "accept the stipulation between the County and plaintiffs that the County was unable to establish that the consolidation ordinances did not have a retrogressive effect." (J. S. App. 3.)[7] The Three-Judge Court expressly ruled:

> [G]iven the reasoning of *Miller*, the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.

(J. S. App. 7.)

[7]Appellants have devoted several pages of their Jurisdictional Statement to a discussion of data typically relevant to a section 2 claim. See J. S. at 3-6. This case does not involve a section 2 claim. The Three-Judge Court expressly stated that it had not made any finding that the consolidation ordinances violated section 2. *Lopez v. Monterey County*, 871 F. Supp. at 1258, n. 4.

At the Status Conference, the State of California strenuously argued, among other points, that the Municipal Courts were creatures of the State, created in the State Constitution,[8] and formed and administered pursuant to superseding State law,[9] not County ordinance. The State also argued that since it was not a jurisdiction covered by section 5, its statutes did not need to be precleared.

[8]At the time of the filing of the complaint, article VI, section 5(a) of the California Constitution provided:

> (a) Each county shall be divided into municipal court and justice court districts as provided by statute, but a city may not be divided into more than one district. Each municipal and justice court shall have one or more judges.
>
> There shall be a municipal court in each district of more than 40,000 residents and a justice court in each district of 40,000 residents or less. The number of residents shall be ascertained as provided by statute.
>
> The Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts. It shall prescribe for each municipal court and provide for each justice court the number, qualifications, and compensation of judges, officers, and employees.

At the November 8, 1994 General Election, the voters enacted an amendment to article VI, section 5 eliminating all justice courts. Municipal court judges are required to run in retention elections. The California Constitution guarantees to the electors of the lower courts the right to vote for all the judges of that court. Cal. Const. art. VI, § 16(b). Vacancies on a municipal court are almost always filled by gubernatorial appointment. *Id.* In 1995, California Governor Wilson appointed two Hispanics and one African-American Judge to the Monterey County Municipal Court.

[9]Numerous State statutes comprehensively regulate the organization and administration of the courts. See, e.g., Cal. Gov't. Code §§ 71001 et seq., 72000 et seq. (Deering 1989); see also Cal. Gov't. Code §§ 73560 et seq. (Deering 1995) for provisions specifically applicable to the Monterey County Municipal Court. A statute also requires that municipal court judges be residents within the boundaries of the court they serve. Cal. Gov't. Code § 71140 (Deering 1989).

In its November 1, 1995 Order, the Three-Judge Court ruled that "the State clearly must be brought into this action in order to bring about a complete resolution of the issues." The Three-Judge Court vacated its March 31, 1993 order to the extent it denied the County's motion to join the State, and joined the State. (J. S. App. 8.)

The State answered the Complaint on November 16, 1995. (See Apps. 7 and 8 of the State's Motion to Dismiss or Affirm.) The State denied the material allegations of the Complaint and asserted several affirmative defenses including, among others, that the action had been rendered moot by the enactment of a State statute subsequent to the consolidation ordinances which currently controlled the election of municipal court judges in Monterey County, that the municipal courts are creatures of the State Constitution and statutes, not local ordinances, and that, since the State is not a jurisdiction covered by section 5, its laws affecting voting do not need to be precleared.

After the State filed its Answer, Appellants filed a brief in the Three-Judge Court maintaining that, despite the pendency of this appeal, the Three-Judge Court had jurisdiction to proceed on the merits of a First Amended Complaint which they proposed to file. (App. 44a.) A status conference is scheduled for September 6, 1996.

ARGUMENT.

I. The Three-Judge Court Has Reopened The Merits Of Whether Appellants Are Even Entitled To A Remedy Under Section 5; At Least Until That Fundamental Question Is Decided A Reorganization Of The Municipal Court Is Not Warranted.

This is not the usual section 5 enforcement action in which, prior to issuance of an injunction, the Three-Judge Court has determined that section 5 applies and that the

defendants have not complied. These questions have not been fully determined below. Until these fundamental questions are decided, there is no justification for disrupting the organization of the Municipal Court and the administration of justice.

In its November 1, 1995 Order, the Three-Judge Court expressly declined to rule that the consolidation of the Municipal Court was retrogressive. The court also reopened the liability phase with regard to the State's answer and defenses. (J. S. App. 2, n. 2.)

The Three-Judge Court clearly expects that, should the State prevail in its contentions, the Court's injunction against holding municipal court elections will be lifted and the action dismissed. The Three-Judge Court ruled:

> The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that "in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire County," (citation omitted), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

(J. S. App. 7-8, original emphasis.)

The State's answer to the Complaint presents the issues of whether the County is administering a superseding State statute in conducting Municipal Court elections; whether the State statutes concerning the Municipal Court consolidation supersede and preempt County ordinances on the

same subject; whether the State of California, a jurisdiction not covered by section 5, is required to obtain preclearance; if preclearance was required, whether it was obtained; if the State is in violation of section 5, what is an appropriate remedy in light of the Equal Protection Clause, the State Constitution (which has not been challenged), the lack of any evidence on the central issue of retrogression, and the State interests embodied in the organization of its judicial system?

These contentions have not been ruled upon by the Three-Judge Court. If it finds that the State is correct in its contentions, the Three-Judge Court's injunction will be lifted and the case dismissed. These issues will be litigated simultaneously with proceedings on this appeal.

Appellants agree that the merits are yet to be fully decided. Appellants said in their brief concerning the Three-Judge Court's continuing jurisdiction:

> The [U.S. Supreme Court] appeal does not challenge any aspects of the November 1, 1995, Order which are not related to the implementation of the temporary court-ordered election plan. Thus, the District Court has continuing jurisdiction to address plaintiffs' anticipated filing of the First Amended Complaint, [and] any issues related to the merits of this action, ...

(App. 45a.)

While this Court has upheld the constitutionality of section 5 when properly applied, this Court has been exceedingly wary of section 5's extraordinary nature and potential for abusive application. This Court said in *Miller v. Johnson*:

> In *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S. Ct. 803 (1966), we upheld § 5 as a necessary and constitutional response to some states' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voter discrimination in the face of adverse federal court decrees." *Id.*, at 335, 16 L.Ed.2d 769, 86 S. Ct. 803 (footnote omitted); (additional citations omitted). But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.

Miller, 575 U.S. at ____, 115 S. Ct. at 2493; *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) ("[Section 5] is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review."); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 141 (1978) (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("[Section 5's] so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." Footnote omitted; ellipsis in opinion).

Principles of federalism and judicial restraint apply when a federal court is asked to interfere with a state's judiciary, especially when anchored in a state's sovereign constitution and statutes which have not been determined to be in violation of any federal law. This Court in *Miller v. Johnson* also cautioned federal courts against intruding in vital local governmental functions, unless demonstrated to be absolutely necessary by strong evidence.

> Federal court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the

duty and responsibility of the state." (Citations omitted.)

Miller, 575 U.S. at ____, 115 S. Ct. at 2488; see also *Voinovich v. Quilter*, 507 U.S. ____, 122 L. Ed. 2d 500 (1993):

> Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. . . . [T]he federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.

Id., at 507 U.S. at ____, 122 L. Ed. 2d at 513.

Clearly, until the fundamental issue of liability has been determined, the dramatic power accorded federal courts and the United States Department of Justice to require a restructuring of the County judicial system should not be exercised.

II. The Three-Judge Court Did Not Err In Refusing To Continue In Effect The Interim Electoral Division Plan, Once It Was Informed Of The Plan's Exclusive Racial Motivation, And In Authorizing Remedial Elections In The Consolidated Municipal Court On A One-Time Basis.

This Court in *Clark v. Roemer*, 500 U.S. 646, 654 (1991) recognized that there may be exigent circumstances in which elections can be held using unprecleared electoral changes. This is such a case.[10]

[10] Appellants claim that the consolidated Municipal Court could not be used for a one-time remedial election because the precleared interim electoral division plan became a bench-mark for evaluating any subsequent plans. First, that plan was ordered into effect *before* the Three-Judge Court knew about its exclusive racial motivation. This also ignores the clear language of 28 C.F.R. § 51.54(b) that a "bench mark" is the "last legally enforceable practice or procedure used by the jurisdiction." The interim electoral plan was not "legally enforceable" by any measure. Appellants and the County concede that the plan is unconstitutional under the Constitution of the State of California. Only by virtue of the Three-Judge Court's December 20, 1994 order could it be implemented. Moreover, it would be extraordinary indeed if a districting plan that was based solely on race, could ever constitute a section 5 benchmark.

While return to the *status quo ante* is the standard remedy in section 5 enforcement cases (*City of Rome v. United States*, 446 U.S. 156, 182 (1980)), liability is a predicate to such a remedy. Moreover, neither Appellants nor the County advocated this solution. Since the Three-Judge Court reopened the question of liability, it would not have been proper for it to resurrect the system of individual municipal and justice courts that existed prior to November 1, 1968. The reasons are obvious.

Not only would such an arrangement be unconstitutional and otherwise illegal under the current State Constitution and statutes,[11] it would result in administrative chaos for the Municipal Court. For example, courtrooms would need to be instituted in all of the resurrected justice courts, administrative personnel hired (e.g., clerk, bailiffs, etc.), and other provisions made for court administration. These courts would also be without judges. Provision would need to be made for their election or appointment, or seven of the current judges would need to be arbitrarily assigned to the justice courts and the remaining three judges split between

[11] It has been suggested that section 5 authorizes federal courts simply to disregard state laws. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But in *Katzenbach*, the state law itself was challenged and was found to be in direct conflict with the Voting Rights Act. Compare *Brooks v. State Board of Elections*, 848 F. Supp. 1548, 1569 (S.D. Ga. 1994), a Voting Rights Act case in which the court refused to approve a consent decree changing the state's system for electing judges in a manner that violated state law "without either a voluntary amendment or a judicial determination that the system violates federal law."

the two municipal courts. This would impose a tremendous burden on the two municipal courts which have by far the largest populations and caseloads.[12] See *Lopez v. Monterey County*, 871 F. Supp. at 1259, n.7. Even if all of this could be accomplished, neither state nor local funding accounts for these resurrected courts which no longer exist. Resurrecting them also presents serious jurisdictional problems.[13]

The Three-Judge Court also was under no obligation to perpetuate the interim electoral division plan once it was informed that its sole motivation was the concentration of voters on the basis of race. Appellants mischaracterize the Three-Judge Court's concerns as mere "reservations" about the constitutionality of the interim electoral plan. (J. S., at 19, n. 17.) This ignores the County's statement that race was the sole motivation.[14]

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[12]For example, under the 1990 Census the Gonzales Justice Court would have a population of 7,880; the Salinas Judicial District would have a population of 146,858. (App. 50a.)

[13]The Department of Justice suggests that the Three-Judge Court could have modified the pre-November 1, 1968 system. (Memo. On App. for a Stay, at 11-12.) This would have been a standardless task resulting in a system violative of both current and former State law. Compare, section 2 cases *Nipper v. Smith*, 39 F. 3d 1494, 1532 (11th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S. Ct. 1794 (1995), citing *Holder v. Hall*, ____ U.S. ____, 114 S. Ct. 2581, 2586 (1994) and *LULAC v. Clements*, 999 F. 2d 831, 871 (5th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 878 (1993). Moreover, it would have been extraordinary for the Three-Judge Court to undertake the legislative task of designing a completely new judicial system in Monterey County when the issue of liability had been reopened.

[14]Amicus Department of Justice notes that *"Miller* . . . does not hold that the consideration of race as *a factor* in designing electoral districts is impermissible." (Memo. On App. For Stay, at 13, emphasis added.) Here, race was conceded to be the *sole factor*; traditional organizational principles for municipal courts were not considered. Compare *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) *aff'd, in part, dismissed, in part* ____ U.S. ____, 115 S. Ct. 2637 (1995). Amicus Department of Justice asserts that the Three-Judge Court did not give the interim plan proper consideration because the court should have held a hearing on its constitutionality under *Miller v. Johnson*. This is incorrect. The court did hold a lengthy hearing on September 28, 1995 preceded by full briefing on the effect of *Miller v. Johnson* on this case. Amicus Department of Justice chose not to appear.

Appellants assert that *Miller* does not constrain the remedial options of the Three-Judge Court once it was determined that the County ordinances had not been precleared. But Federal courts must implement a remedy which addresses the discriminatory features of a successfully challenged election system. See *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

In this case, there have been no concrete findings by any court concerning the specific nature of the alleged retrogressive effects, if any, of the consolidation ordinances. The County's stipulation that it could not disprove retrogression does not suffice under *Miller*.[15] This is especially true when Appellants had stipulated that there was no evidence of purposeful discrimination.

The Department of Justice has criticized the Three-Judge Court for not fashioning its own remedial plan once it learned that the interim electoral division plan was solely race-based. This ignores the fact that the parties had tried to develop a legal plan for years and finally the County stipulated that there was no alternate election division plan consistent with State law and which satisfied the Appellants'

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[15]Under *Miller v. Johnson*, the proponents of a race-based plan must demonstrate a "strong basis in evidence of the harm being remedied." *Miller*, 575 U.S. at ____, 115 S. Ct. at 2491. "Blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500-501 (1989)).

view of the mandates of the Voting Rights Act, racially drawn divisions. (J. S. App. 103-107.) See also *Lopez v. Monterey County*, 871 F. Supp. at 1257. Moreover, as to the issue of retrogression, the Three-Judge Court remained totally without standards in devising a remedial plan as there were no findings on retrogression. Moreover, the very issue of liability had been reopened below.

Under the exigent circumstances described above ordering remedial elections in the consolidated Municipal Court was a proper exercise of equitable discretion. The November 1, 1995 Order also maintains the administrative integrity of the Municipal Court and provides a stable environment in which to administer justice by providing for a single remedial election in accordance with state law, and normal six-year terms for those elected, ample time for the question of liability in this case to be finally decided.

III. The Ongoing Proceedings In The Three-Judge Court On The Fundamental Question of Liability May Moot This Appeal.

Exercising prudential discretion, this Court has often declined an appeal even when jurisdiction is technically present. As Chief Justice Rehnquist stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972):

> This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clear cut and concrete form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 584, 91 L.Ed. 1666, 1686, 67 S. Ct. 1409 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.*, at 574, 91 L.Ed. at 1681.

Socialist Labor Party, 406 U.S. at 588 (footnote omitted).

In *Socialist Labor Party*, this Court dismissed an appeal as abstract, hypothetical, and premature, in a case in which changes in the law rendered most of the issues moot, except for a single challenge which received scant attention in the complaint. The nature of the injury suffered was also speculative.

Given the procedural posture of this case, in which the merits have been reopened, similar concerns exist. None of the preclearance issues raised by the State have been determined in the court below. Until that determination, the injury to Appellants, if any, is wholly speculative. Moreover, the Three-Judge Court's ruling could render the issues in this appeal moot. Elections for Municipal Court judges should not be enjoined or the administration of the court disrupted until liability and injury have been demonstrated.

The Court has declined to exercise jurisdiction based on such prudential concerns. For example, in *Cowgill v. California*, 396 U.S. 371 (1970), this Court granted a motion to dismiss in a case presenting the question of whether displaying a mutilated American flag is protected speech. Justice Harland, with Justice Brennan concurring, explained their reasons for granting the motion. While the question was a substantial one, the record failed to "flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellants conduct" This predicate question had not been determined by the court below. Therefore, exercising prudential discretion over its jurisdiction, the Court dismissed the appeal.

Similarly here, the predicate issue of whether Appellants are entitled to relief has not been fully determined by the Three-Judge Court. Compare *Minick v. California Dept. of Corrections*, 452 U.S. 105 (1981) in which the Court dismissed a petition for certiorari since the record below was ambiguous and the federal question might have been affected by additional proceedings in the State courts. See

also *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

In this case, the construction of section 5, its application to the State of California, and the relationship of the State statutes and County ordinances have not been resolved. Until those issues are settled, a decision by this Court on the Questions Presented by Appellants may well be wholly advisory, hypothetical, or rendered moot by further proceedings below.

CONCLUSION.

The November 1, 1995 Order of the Three-Judge Court should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

Marguerite Mary Leoni
Counsel of Record for Intervenor-Appellee

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Index to Appendix*

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* Originals have not been modified to correct typographical and other types of errors.

APPENDIX 1

Civil Action No. 93-1639
(CRR, SSH, KLH (U.S.C.A.))

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED OCT. 7, 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

COUNTY OF MONTEREY, CALIFORNIA
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

and

VICKI M. LOPEZ, et al.
Defendant-Intervenors.

STIPULATED DISMISSAL

It is hereby stipulated, by and between counsel for all parties hereto, as follows:

1. All claims presented by the complaint herein shall be dismissed without prejudice pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

2. Each party shall bear its own costs and attorneys' fees except as otherwise agreed to by Joaquin Avila, counsel for the intervenors, and Monterey County in the memorandum

of agreement executed by and between them on October 4, 1993.

Dated: October 7, 1993

/s/ KATHLEEN McGUAN (by MDR)
Counsel for Plaintiff
Monterey County, California

/s/ MARY D. RODRIGUEZ
Counsel for Defendant
United States of America

/s/ JOAQUIN AVILA (by MDR)
Counsel for Intervenors
Vicki M. Lopez, et al.

APPENDIX 2

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Attorneys for Defendant
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Civil Action No.
C-91-20599-RMW (EAI)
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, JESSE G. SANCHEZ,
and DAVID SERENA,
Plaintiffs,
v.
MONTEREY COUNTY, CALIFORNIA
Defendant.

PARTIES STIPULATION AND COURT ORDER
Voting Rights Action
Three Judge Court

The Plaintiffs, Vicky M. Lopez, *et al.*, and Defendant Monterey County, California, in order to permit the adoption of an election area plan for the election of Municipal

PARTIES STIPULATION AND COURT ORDER

Judges to the Monterey County Municipal Court District hereby stipulate as follows:

1. Both Plaintiffs and the Defendant want to settle this litigation to enforce Section 5 of the Voting Rights Act and avoid any further litigation.

2. As a result of this Court's Order dated March 31, 1993, Defendant Monterey County was required to submit municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. As a result of this Court's Order, Monterey County filed a declaratory judgment action pursuant to Section 5 seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C.Dist.Colum.1993). By an Order filed on September 7, 1993, the United States District Court for the District of Columbia permitted the Plaintiffs in this action to intervene as defendants-intervenors in the *Monterey County v. United States of America* action.

3. Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act. Monterey County, however, stipulates that it is unable to establish that these ordinances did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength in Monterey County. For this reason, Monterey County agreed not to enforce these municipal court judicial district consolidation ordinances in future elections

for the Monterey County Municipal District Court. As a result of this agreement, the United States of America, Monterey County, and the *Lopez, et al.*, defendants-intervenors stipulated to a dismissal of the action in the District of Columbia federal court.

4. Monterey County and the Plaintiffs in this action have agreed to the implementation of an election area plan for the election of municipal court judges to the Monterey County Municipal Court District. This agreement only affects the electoral process and does not affect the county wide jurisdiction of the Monterey County Municipal Court District. The California State Constitution provides that municipal court judges "shall be elected in their counties or districts at general elections." [Cal.Const.Art VI, Sec. 16(b).] Arguably this provision requires that all municipal court judges be elected within the entire boundaries of the district. To the extent that this provision inhibits or prevents the ability of Monterey County to adopt and implement an election area plan for the election of municipal court judges to the Monterey County Municipal Court District, the application of this provision to Monterey County must be suspended.

5. Both Monterey County and the Plaintiffs believe that if the application of this provision is not suspended, insofar as such provision affects Monterey County and the election of municipal court judges, Monterey County will not be able to adopt and implement any election plan for municipal court judges which will secure the necessary approval pursuant to Section 5 of the Voting Rights Act. Should Monterey County not be permitted to implement an election area plan which secures the requisite Section 5 approval, then this Court will be faced with the task of fashioning a court-ordered plan or ordering the County of Monterey to revert to the implementation of the last lower court district plan in

effect at the time Monterey County became a covered jurisdiction under the Voting Rights Act, evidenced in County Ordinance No. 1347, as amended by Ordinance No. 1597, and which consisted of two municipal court districts, with two municipal court judges sitting in each such district, and seven justice court districts with one justice court judge in each such district. In order to avoid any additional expenditure of judicial resources, Monterey County and the Plaintiffs have agreed to the implementation of an election area plan, as generally described in the proposed Order, which will secure the requisite Section 5 approval. Nevertheless, the suspension of the aforementioned provision of state law, to the extent an election area plan is inconsistent with such provision, is necessary to comply with the Voting Rights Act.

6. Monterey County seeks to have in place an election area plan for the election of municipal judges to the Monterey County Municipal Court District in time for the commencement of the June 1994 election process. The June 1994 election process commences on December 27, 1993 with the time period for the issuance of petitions for gathering signatures in lieu of filing fees. West's Ann.Cal.Elec.Code § 6555(b).

7. Monterey County will seek Section 5 approval of an election area plan, consistent with the Order, from the United States Attorney General. Representatives from the United States Attorney General have informed us that expedited review of the election area plan submission will be given serious consideration to accommodate the impending election schedule. In view of the impending election schedule, Monterey County will submit an election area plan to the United States Attorney General for expedited review. Once Section 5 approval is secured and this Court agrees to

suspend the operative effect of the aforementioned provision, the election area plan can be implemented in time for the June 1994 elections. Should this Court not grant the requested Order, then proceedings should be initiated for the implementation of a court-ordered plan.

DATED: November 22, 1993

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

DATED: November 19, 1993

DOUGLAS C. HOLLAND

By: /s/ DOUGLAS C. HOLLAND
DOUGLAS C. HOLLAND
Attorney for Defendant
Monterey County, California

ORDER

Based upon the Parties Stipulation, this Court hereby ORDERS that the application of Article VI, Section 16(b) of the California State Constitution is hereby suspended only for Monterey County, California, in order to permit Monterey County to adopt and implement a election area plan for municipal court judges which will secure the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Monterey County has stipulated that the municipal court judicial district consoli-

dation ordinances, which are the subject of this Section 5 enforcement action, result in a retrogression of minority voting strength. Accordingly, Monterey County dismissed its declaratory judgment action seeking Section 5 approval of these county ordinances. The Section 5 declaratory judgment action was filed in the United States District Court for the District of Columbia and was styled *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C.Dist.Colum. 1993).

Monterey County is hereby ordered to adopt a Municipal Court District Election Plan that contains the following minimum components:

1. There will be one Municipal Court District. This District will be county-wide. All municipal court judges, regardless of residency or election area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or election area.

2. The initial Election Area Plan shall consist of seven election areas. An election area will be a specific geographic area in which only the persons residing may vote. These election areas shall be used solely for the purpose of electing municipal court judges. These election areas shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations. Three of the election areas will be two-judge election areas; four of the election areas will be one judge election areas.

3. The Election Area Plan shall comply with the requirements of the Voting Rights Act and each election area shall be nearly equal in population as may reasonably be achieved with the understanding that each two judge election area shall be approximately twice the size in population as a single judge election area.

4. The Board of Supervisors of the County will be responsible for the designation of incumbent judges to specific election areas. The Board of Supervisors in its sole discretion may decline to designate specific judges to specific election areas and if it so elects, no incumbent will be so designated and such undesignated seats will be considered open seats.

5. Nothing in this plan shall be deemed to prohibit or limit in any way any otherwise qualified person, including any current municipal court judge, to pursue election to any municipal court seat in any election area, except that any judge running for election in an election area that he or she has not been designated as the incumbent, shall not be considered an incumbent and such judge shall not use the designation of "incumbent" in any such election.

6. The terms of office of Judges Robert Moody, Stephen Sillman, and Wendy Duffy will not be affected by the adoption of this plan.

7. There shall be no residency requirement other than residency in the County for election to any seat on the municipal court bench. Residency in a specific election area shall not be required.

8. Nothing in this plan shall limit or restrict in any way the ability of the County to determine the location of courtrooms or the staffing of courtrooms.

The Court hereby suspends only for Monterey County, California, the application of Article VI, Section 16(b) of the California State Constitution to permit Monterey County to comply with the federal requirements of Section 5 of the Voting Rights Act insofar as such constitutional provision may inhibit or prevent the implementation of the election area plan as described in this Order. The Parties

shall advise this Court of any administrative action taken by the United States Attorney General pursuant to Section 5 of the Voting Rights Act with respect to the approval of any election area plan for the election of municipal court judges for the Monterey County Municipal Court District.

Panel: Circuit Judge Mary M. Schroeder
District Judge James Ware
District Judge Ronald M. Whyte

DATED: _____ _____
MARY M. SCHROEDER
United States Circuit Judge

DATED: _____ _____
JAMES WARE
United States Circuit Judge

DATED: _____ _____
RONALD M. WHYTE
United States Circuit Judge

PARTIES STIPULATION AND COURT ORDER

APPENDIX 3

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Attorneys for Plaintiffs

Civil Action No. C-91-20559-RMW (EAI)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, JESSE G. SANCHEZ
and DAVID SERENA,
Plaintiffs,
v.
MONTEREY COUNTY, CALIFORNIA,
Defendant,
STATE OF CALIFORNIA,
Defendant-Intervenor.

PARTIES SECOND STIPULATION AND COURT ORDER
Voting Rights Action
Three Judge Court

The Plaintiffs, Vicky M. Lopez, *et al.*, and Defendant Monterey County, California in order to permit the adoption of an election system for the election of Municipal Judges to

the Monterey County Municipal Court District hereby stipulate as follows:

1. Both the Plaintiffs and the Defendant want to settle this litigation to enforce Section 5 of the Voting Rights Act and avoid any future litigation.

2. As a result of this Court's Order dated March 31, 1993, Defendant Monterey County was required to submit municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C § 1973 c. As a result of this Court's Order, Monterey County filed a declaratory judgment action pursuant to Section 5 seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C.Dist.Colum. 1993). By an Order filed on September 7, 1993, the United States District Court for the District of Columbia permitted the Plaintiffs in this action to intervene as defendants-intervenors in the *Monterey County v. United States of America* action.

3. Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act. Monterey County, however, stipulates that it is unable to establish that these ordinances did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength in Monterey County. For this reason, Monterey County agreed not to enforce these municipal court judicial district consolidation ordinances in future elections

for the Monterey County Municipal District Court. As a result of this agreement, the United States of America, Monterey County, and the *Lopez, et al*, defendants-intervenors stipulated to a dismissal of the action in the District of Columbia federal court.

4. Monterey County and the Plaintiffs in this action have agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal District Court. This agreement only affects the electoral process and does not affect a municipal court's countywide jurisdiction. Both the Plaintiffs and the Defendants agree that the Monterey County Municipal Court District shall be divided into four divisions. For the purpose of election of judges, the term "division" as used in this stipulation and proposed Court Order is and shall continue to be the "district" referred to in subdivision (b) of Section 16 of the Article VI of the Constitution of the State of California. Except as otherwise expressly provided in this paragraph, the term "district" as used in this stipulation and proposed Court Order shall mean a countywide municipal court district and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

5. Both Monterey County and the Plaintiffs believe that if this Court does not approve and issue the Order as proposed, Monterey County will not be able to adopt and implement any election system for municipal court judges which will secure the necessary approval pursuant to Section 5 of the Voting Rights Act. Should Monterey County not be permitted to implement a Municipal Court Division Plan which secures the requisite Section 5 approval, then this Court will be faced with the task of fashioning a court-

ordered plan. In order to avoid any additional expenditure of judicial resources, Monterey County and the Plaintiffs have agreed to the implementation of a Municipal Court Division Plan, as generally described in the proposed Order, which will secure the requisite Section 5 approval. Any conflict between any California law and the provisions of this Order should be resolved in favor of the Order, in order to ensure full compliance with the Voting Rights Act.

6. Monterey County seeks to have in place a Municipal Court Division Plan for the election of municipal judges to the Monterey County Municipal District Court in time for the commencement of the June 1994 election process, at least insofar to ensure elections in two of the proposed divisions. The Plaintiffs and Monterey County have previously provided the Court with an amended election schedule which will permit the June 1994 election process to proceed.

7. Monterey County will seek Section 5 approval of the Municipal Court Division Plan, consistent with the Order, from the United States Attorney General. Representatives from the United States Attorney General have informed us that expedited review of the Municipal Court Division Plan submission will be given serious consideration to accommodate the impending election schedule. In view of the impending election schedule, Monterey County will submit a Municipal Court Division Plan to the United States Attorney General for expedited review. Once Section 5 approval is secured, the Municipal Court Division Plan can be implemented in time for the June 1994 elections. Should this Court not grant the requested Order, then proceedings

should be initiated for the implementation of a court-ordered plan and an appropriate election schedule.

DATED: January 13, 1994

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

DATED: January 13, 1994

DOUGLAS C. HOLLAND

By: /s/ DOUGLAS C. HOLLAND
DOUGLAS C. HOLLAND
Attorney for Defendant
Monterey County

ORDER

Based upon the Parties Stipulation, this Court hereby ORDERS Monterey County to adopt and implement a Municipal Court Division Plan for municipal court judges which will secure the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Monterey County has stipulated that the municipal court judicial district consolidation ordinances, which are the subject of this Section 5 enforcement action, result in a retrogression of minority voting strength. Accordingly, Monterey County dismissed its declaratory judgment action seeking Section 5 approval of these county ordinances. The Section 5 declaratory judgment action was filed in the

United States District Court for the District of Columbia and was styled *Monterey County v. United States of America*, Civil Action No. 93-1639 (C.R.R.) (D.C. Dist. Colum. 1993). Monterey County has further stipulated that it is unable to adopt a plan without guidance and direction of this Court.

Monterey County is hereby ordered to adopt a Municipal Court Division Plan that contains the following minimum components:

1. There will be one Municipal Court District. This District will be county-wide. All municipal court judges, regardless of residency or division area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or division area. For the purpose of this Order, the term "district" is and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

2. The initial Municipal Court Division Plan shall consist of four divisions. A division will be a specific geographic area in which only the persons residing may vote. These judicial divisions shall be used solely for the purpose of electing municipal court judges. These divisions shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations. Three of the divisions will be one judge divisions. The fourth division shall consist of seven judges. For the purpose of election of judges, the term "division" as used in this Order is and shall be the "district" referred to in subdivision (b) of Article VI of the Constitution of the State of California.

3. The Municipal Court Division Plan shall comply with the requirements of the Voting Rights Act.

4. The Board of Supervisors in consultation with the Judges of the Municipal Court Bench at a public meeting conducted concurrently with Board consideration and adoption of the Municipal Court Division Plan, shall designate judges to specific divisions and establish an election schedule for the conducting of elections for terms of office that would otherwise expire on January 2, 1995. In the event the Board and the judges can not agree, designations to divisions shall be accomplished by lottery, conducted by the Board at such public meeting and elections for offices that were previously scheduled to expire on January 2, 1995, shall be conducted pursuant to the modified election schedule attached to this Order as Attachment "A". In making the designations described above and establishing an election schedule, each division in which a racial or ethnic minority comprises at least a majority of the population in such division shall be allocated one vacant judicial position, if such position or positions exist, and regardless of whether any vacancy exists, elections shall be conducted in such divisions pursuant to the modified election schedule attached to this Order as Attachment "A".

5. Nothing in this Municipal Court Division Plan shall be deemed to prohibit or limit in any way any otherwise qualified person, including any current municipal court judge, to pursue election to any municipal court seat in any division.

6. The terms of office of Judges Robert Moody, Stephen Sillman, and Wendy Duffy will not be affected by the adoption of this Municipal Court Division Plan.

7. There shall be no residency requirement other than residency in the County for election to any seat on the municipal court bench. Residency in a specific division shall not be required.

8. Nothing in this Municipal Court Division Plan shall limit or restrict in any way the ability of the County to determine the location of courtrooms or the staffing of courtrooms.

9. The Municipal Court Division Plan shall become operative on January 2, 1995.

10. To the extent the provisions of this Order are inconsistent with the provisions of any provision of the California State Constitution or any statute of the State of California, the provisions of this Order shall prevail and control.

11. The Parties shall advise this Court of any administrative action taken by the United States Attorney General pursuant to Section 5 of the Voting Rights Act with respect to the approval of any Municipal Court Division Plan for the election of municipal court judges for the Monterey County Municipal Court District.

Panel: Circuit Judge Mary M. Schroeder
District Judge James Ware
District Judge Ronald M. Whyte

Dated: _____

MARY M. SCHROEDER
United States Circuit Judge

Dated: _____

JAMES WARE
United States Circuit Judge

Dated: _____

RONALD M. WHYTE
United States Circuit Judge

APPENDIX 4

NO. C 91 20559 RMW (EAI)
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FILED MARCH 1, 1994; RICHARD W. WIEKING;
CLERK, U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, JESSE G. SANCHEZ,
and DAVID SERENA,
Plaintiffs,
v.
MONTEREY COUNTY, CALIFORNIA
Defendant

ORDER REQUIRING SUBMISSION OF ELECTION PLAN FOR PRECLEARANCE; ALTERNATIVE ORDER TO SHOW CAUSE; ORDER ENJOINING ELECTION PENDING PRECLEARANCE

BACKGROUND

In its order dated March 31, 1993, this court found that certain Monterey County municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973 c, and that such preclearance had not been obtained. As a result of this court's order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C.Dist. Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County, then, stipulated with plaintiffs that it would be unable to establish that these ordinances did

not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County to adopt the system before preclearance. However, by order dated December 22, 1993 this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan, in an attempt to comply with Section 5, also appears to conflict with certain provisions of the California Constitution and certain state laws.

ROLE OF THREE-JUDGE COURT

The role of the three-judge court entertaining an action under Section 5 of the Voting Rights Act is limited. In *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), the Court describes that role:

> [The three-judge court determines] (1) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate. . . .

Since this court determined in its March 31, 1993 order that (1) the County's consolidation ordinances were covered by § 5 and (2) Section 5's approval requirements were not

satisfied, the question at this point is what remedy is appropriate. The remedy Section 5 contemplates is injunctive relief. *Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, 1482 (S.D.Ga. 1989). In *Perkins v. Matthews*, 400 U.S. 379, 385 (1971) the Court pointed out what this court cannot do:

> What is foreclosed to [the court] is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney-General-the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'

The three-judge court has some limited discretion in fashioning the "appropriate remedy" to ensure that § 5's approval requirements are met. *See e.g. Perkins v. Matthews*, 400 U.S. 379, 396 (1971). In *N.A.A.C.P. v. Hampton County Election Commission*, 470 U.S. 166, 179 (1985) and *Berry v. Doles*, 438 U.S. 190, 192 (1978), the Supreme Court directed that appropriate relief under Section 5 should include an order allowing 30 days for the state to submit covered changes to the Attorney General for approval. In *Berry v. Dole*, the Court found that the District Court committed reversible error by not ordering the Peach County officials to seek preclearance of the voting change. *Berry v. Dole*, 438 U.S. 187, 193 (1978). Once the state has "successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen v. State Board of Elections*, 393 U.S. 544, 549-50 (1968).

CURRENT ISSUE BEFORE COURT

In the instant case, the parties acknowledge that any newly proposed election plan must be submitted for

preclearance to the Attorney General or the United States District Court for the District of Columbia. The plaintiffs and County submit that this court should at this time order adoption of their newly proposed plan before it is submitted for preclearance, because suspension of certain California constitutional provisions and statutes may be necessary in order for the plan to meet the requirements of the Voting Rights Act. The State and Judge Fields object to the court's ordering adoption at this point, as they claim that an insufficient showing has been made that a plan cannot be fashioned without conflicting with state requirements.

FINDING BY COURT

The court is not satisfied based upon the showing made to date that a new election plan for the election of Municipal Court judges must conflict with the California Constitution or any California statute in order to comply with the Voting Rights Act. Therefore, it makes the order set forth below.

ORDER

Good cause appearing, the County of Monterey is hereby ordered to submit forthwith to the Attorney General or the United States District Court for the District of Columbia a new election plan for preclearance that complies with the Voting Rights Act and does not violate the state constitution or any law of the State of California. If the County is unable to submit a new election plan that complies with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it shall show cause on March 31, 1994 at 1:30 p.m. in this court as to why it cannot do so. The showing should identify the specific constitutional provision or statute with which it cannot comply and the factual basis for its conclusion that it cannot comply. The factual basis should be supported by affidavit, stipulation of the parties, or other admissible evidence.

This factual showing should be filed and served on all parties at least 15 days before the hearing on the order to show cause and each party should file at least 5 days before the hearing any objections it has to the County's factual showing and state any issue on which it believes an evidentiary hearing is required. The court will then decide at the hearing on March 31, 1994 whether an evidentiary hearing will be necessary and, if not, whether the County should be ordered to adopt a plan that conflicts with state law in order to have a plan that it can submit for Section 5 preclearance to the Attorney General or the United States District Court for the District of Columbia.

The County is hereby enjoined pending preclearance of a new election plan or further order of this court from holding an election for judges for the municipal court.

DATED: February 28, 1994

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge
on Behalf of the Panel

Copy of Order mailed on March 1, 1994 to:

Joaquin G. Avila
Parktown Office Bldg.
1774 Clear Lake Avenue
Milpitas, CA 95035-7014

Barbara Y. Phillips
269 Anderson Street
San Francisco, CA 94110

Douglas C. Holland
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APPENDIX 5

NO. C 91 20559 RHW (EAI)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSE G. SANCHEZ, and DAVID SERENA,
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA
Defendant.

ORDER GRANTING UNITED STATES' NOTICE TO PARTICIPATE AS AMICUS CURIAE; ENJOINING ELECTIONS PENDING PRECLEARANCE; AND DENYING MOTION TO VACATE JUDICIAL APPOINTMENTS OR SHORTER TERMS

BACKGROUND

In its order dated March 31, 1993, this court found that certain Monterey county municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, and that such preclearance had not been obtained. As a result of this court's order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C.Dist.Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County then stipulated with plaintiffs that it would be unable to establish that these ordi-

nances did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County of Monterey to adopt the system before preclearance. However, by order dated December 22, 1993, this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County of Monterey and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan also conflicted with certain provisions of the California Constitution and certain state laws.

On March 1, 1994, this court ordered the County of Monterey to submit to the Attorney General or the United States District Court for the District of Columbia a new election plan for preclearance that complied with the Voting Rights Act and did not violate the state constitution or any law of the State of California. The court further ordered that if Monterey County were unable to submit a new election plan that complied with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it should show cause why it could not do so.

On March 16, 1994, in response to the order to show cause, Monterey County and plaintiffs submitted stipulations that included a list of 10 proposals and a citation to the state law violated by each respective plan. Stipulation 15

states that "[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply (sic) with the Voting Rights Act."

On May 3, 1994, this court issued a tentative order directing a county-wide election in November based upon an interim reapportionment plan. The court recognized that the interim plan, which was, in effect, the voting system implemented by the unprecleared ordinances, would not remedy the apparent discriminatory effect that the unprecleared voting system had on Latino voters. However, the court believed the interim plan, which called for shortened terms of those judges elected, would preserve the citizens' right to elect judges while a permanent legislative solution was being developed and a plan precleared. The court also felt that its interim plan created fewer problems than any of the solutions offered by the parties. The court allowed the parties until May 13, 1994 to file any comments or objections to its tentative order. All parties, except the State, filed responses raising questions about or objecting to the tentative order.

On May 13, 1994 the United States filed a motion for leave to participate as amicus curiae which the court hereby grants.

For the reasons set forth below, the court vacates its tentative order and hereby issues an injunction barring any elections for municipal court judges pending preclearance of a new voting system or further order of this court.

II. ANALYSIS

In its tentative order of May 3, 1994, the court concluded that the interests of the voters mandated holding an interim election under an unprecleared system pending Monterey

County's adoption and preclearance of a plan that complies with state and federal law. The court is now convinced that permitting the voters to cast ballots under a plan that has not been precleared and that has an apparent retrogressive effect on Latino voting strength would not be in the best interest of the voters.

The Supreme Court has indicated that the three-judge court has limited discretion in fashioning an appropriate remedy in Section 5 cases. *See e.g., Perkins v. Matthews*, 400 U.S. 379, 441 (1971). Section 5 contemplates the remedy of injunctive relief. *Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, 1482 (S.D.Ca. 1989). In the instant case, an injunction pending preclearance is the most appropriate remedy.

Redistricting and reapportionment are " 'primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court,' " *Voinovich v. Guiltar*, ___ U.S. ___, 113 S. Ct. 1149, 1157 (1993) (citation omitted). In the instant case, the County of Monterey has failed to devise and preclear a plan that conforms with both the Voting Rights Act and with state law. The very purpose of Section 5 is to require preclearance before changes can be put into effect, and to avoid using litigation by voters as the mechanism for testing changes in voting laws. *See e.g., McCain v. Lybrand*, 465 U.S. 236, 243-44 (1984).

This court has considered the possibility of ordering an election in accordance with one of the plans proposed by the County and plaintiffs. Under the plan preferred by them, one of the municipal court districts would have less than 40,000 residents in violation of Article VI, Section 5 of the California Constitution, the City of Salinas would be divided into two districts in violation of Government Code Section 71040, and there would not be congruity of electoral base and jurisdictional base as required by Article VI,

Section 16(b) of the California Constitution. The State objects to such a plan and argues that an elimination of the requirement of congruence between jurisdictional and electoral base would pose serious problems by depriving people of voting rights. The State urges that, in any interim or permanent solution, the court not suspend the state law requirements that municipal court judges stand election before all of the voters in the district over which they will preside and candidates for municipal court reside in the district of their election.

The court is satisfied that the adoption of a plan as currently proposed by Monterey County and plaintiffs as an interim solution would alter the structure embodied in the California constitution and statutes, would do too much violence to legislative and state interests, and would create more problems than it solves. In fashioning a redistricting plan "or in choosing among plans, district courts should not . . . 'intrude upon state policy any more than necessary.' " *Upham v. Seamon*, 456 U.S. 35, 42 (1982) (citation omitted). In its amicus brief, the United States additionally proposed, as a possible option, implementation, on an interim basis, of the election scheme that was in effect for municipal judges on November 1, 1968. However, as plaintiffs and the County have noted, such an alternative is not a workable interim solution.

The court believes that the County and plaintiffs have acted in good faith in attempting to develop an appropriate plan, but the State has apparently not yet been involved in the process. The court recognizes that the task of developing a plan is a difficult one that will require plaintiffs, the County, and the State to work together. It also appears that a solution may require state legislative action. The United States, through its amicus brief, has now volunteered to assist the parties in devising a system that complies with the Voting Rights Act. Therefore, the court concludes that the

most appropriate remedy at this point is to enjoin an election pending preclearance of an appropriate redistricting plan and to allow the parties limited additional time to reach and implement a solution. If, however, the parties do not move forward expeditiously or are unable to reach a legislative solution, the court will have to take more drastic action including possible implementation of a judicially created redistricting plan. However, given the complexity of the problem, the fact that reapportionment tasks are best left to the legislature, and the fact that legislative solutions necessarily take some time, the court concludes that enjoining an election prior to preclearance is the most appropriate remedy at this time.

The court wishes to underscore the urgency with which it views Monterey County's responsibility to develop and preclear a plan that complies with state and federal law. The County is urged to promptly seek any legislative changes or changes in the administrative structure of its courts that may be necessary in order to expeditiously adopt and preclear a viable plan. The court has avoided developing its own plan only because it is convinced that the County has not neglected its legislative responsibilities and is committed to working with plaintiffs and the State to fulfill its reapportionment obligation.

In its motion for leave to participate amicus curiae, the United States has offered "to assist the parties in the development of an appropriate remedy if the court believes that such assistance would be beneficial." The State is currently a party to these proceedings. The court finds that it would be beneficial for the State and the United States to assist the County in the development and expedited preclearance of a plan that will comply with the Voting

Rights Act and with federal and California state law (or at least minimally intrude on state policy).[1]

ORDER

1. Monterey County is ordered to develop a plan for the election of municipal court judges which complies with the Voting Rights Act and intrudes on state policy no more than necessary. The County shall take any steps required to obtain changes in existing state law or county ordinances. The State shall participate and assist in the County's development of such a plan.

2. Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a new plan. The court requests the cooperation and the assistance of the United States in the development and preclearance process.

3. The court orders the parties to appear at a status conference on November 3 at 1:30 p.m. to report on their progress at which time the court will determine whether sufficient steps have been taken to justify continuing the injunction in effect or whether some other remedy needs to be fashioned. The parties should be prepared to inform the court of measures taken to effect any legislative changes or changes in the County's administrative structure that may be necessary, of any alternative plans that have been developed, and of a timetable for the implementation and preclearance of a plan.

The motion by plaintiffs to vacate judicial appointments or shorten terms is denied. The governor's appointment powers are not the subject of the Section 5 proceedings and

---

[1]The court has not foreclosed the possibility of authorizing a plan for preclearance that violates existing state law, if the court is satisfied that intrusion upon state policy is necessary.

the orderly administration of justice requires that vacancies by appropriately filled. Any judges appointed will have to face election under the new districting plan.

DATED: June 1, 1994

By: /s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge
on Behalf of the Panel

Copy of Order mailed on _____ to:

Joaquin G. Avila
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Milpitas, CA 95035-7014

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Michael W. Stamp
405 Pine Avenue
Pacific Grove, CA 93950

APPENDIX 6

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
VOTING SECTION
P.O. BOX 66128
WASHINGTON, D.C. 20055-6188

March 6, 1995

Douglas C. Holland, Esq.
County Counsel
P.O. Box 1587
Salinas, California 93902-1587

Dear Mr. Holland:

This refers to the submissions to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of the following voting changes for the municipal court of Monterey County, California:

1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships;

2. the establishment of a tenth municipal court judgeship;

3. the adoption of an interim election plan for a 1995 special election pursuant to which municipal court judges shall be elected from four election subdistricts (known as divisions) with Divisions 1, 2, and 3 each electing one judge and Division 4 electing seven judges;

4. the districting plan for the divisions (as adopted on December 20, 1994, and modified in the manner reflected in the February 21, 1995, correspondence from the county's demographer, Dr. Jeanne Gobalet);

5. the term of office of persons elected as municipal court judges pursuant to the interim election plan; and

6. the procedures for conducting a June 6, 1995, special primary and an August 1, 1995, special runoff election to elect one judge each in Divisions 1, 2, and 3, and four judges in Division 4 (superseding the procedures for conducting a single, "winner-take-all" election on June 6, 1995).

We received your submission of the municipal court consolidation, the interim election plan, the districting plan (as adopted on December 20, 1994), the term of office, and the procedures for conducting a June 6, 1995, single election on January 3, 1995; your submission of the procedures for conducting a June 6, 1995, special primary and an August 1, 1995, special runoff election on January 11, 1995; your submission of the revisions to the districting plan on February 23, 1995; and your submission of the additional judgeship on March 6, 1995. Supplemental information was received on January 6 and February 26, 1995.

The Attorney General does not interpose any objection to the municipal court consolidation, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine these changes if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (29 C.F.R. 51.41 and 51.43).

With regard to the procedures for conducting a single June 6 special election, this change has been superseded and, accordingly, the Attorney General will make no determination with respect to this change.

Sincerely,

DEVAL L. PATRICK
Assistant Attorney General
Civil Rights Division

By: /s/ ELIZABETH JOHNSON
ELIZABETH JOHNSON
Acting Chief, Voting Section

cc: Joaquin G. Avila, Esq.

APPENDIX 7

NO. C-91-20559 RMW(EAI)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FILED SEPTEMBER 7, 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

VICKY M. LOPEZ ET AL.,
Plaintiffs, v.
MONTEREY COUNTY, CALIFORNIA,
Defendant.
STATE OF CALIFORNIA,
Intervenor-Defendant

ORDER RE BRIEFING FOR STATUS CONFERENCE

The parties are hereby requested to brief the effect of *Miller v. Johnson*, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the status conference on September 28, 1995 at 1:30 p.m.

DATED: September 6, 1995

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

APPENDIX 8

Case No. C-91-20559

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLES RONALD M. WHYTE, JUDGE
THE HONORABLE MARY SCHROEDER, JUDGE
THE HONORABLE JAMES WARE, JUDGE

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSE G. SANCHEZ, and DAVID SERENA,
Plaintiffs,
vs.
MONTEREY COUNTY, CALIFORNIA,
Defendant.

Thursday, September 28, 1955
San Jose, California

Reporter's Transcript of Proceedings

APPEARANCES

For the Plaintiffs — Joaquin G. Avila, Attorney at Law
Parktown Office Building
1774 Clear Lake Avenue
Milpitas, California 95035

Reported By — Lee-Anne Shortridge
Certified Shorthand Reporter
#9595

Appearances Continued on Next Page

For the Defendant Monterey County	Douglas C. Holland, County Counsel County of Monterey Courthouse P.O. Box 1587 Salinas, California 93902
For the Intervenor State of California	Manuel M. Medeiros and Daniel G. Stone, Deputy Attorneys General 1300 I Street, Suite 1101 Sacramento, California 94244
For the Intervenor Judge Stephen A. Sillman	Nielsen, Merksamer, Parrinello, Mueller & Naylor Marguerite Mary Leoni, Attorney at Law 591 Redwood Highway, Suite 4000 Mill Valley, California 94941

Thursday, September 28, 1995

THE CLERK: Calling case C-91-20559, Vicky Lopez versus Monterey County, on for status conference.

MR. AVILA: Joaquin Avila for the Plaintiffs, and with me at counsel table is my law clerk, Linda Stone, and an attorney working out of my office helping me on this case, Linda Gonzales.

MR. HOLLAND: Douglas Holland appearing on behalf of Monterey County.

MR. MEDEIROS: Good afternoon, Your Honor. Manuel Medeiros, Deputy Attorney General, and Daniel Stone, Deputy Attorney General, appearing for the Attorney General.

MS. LEONI: Marquerite Mary Leoni from Nielsen, Merksamer, Parrinello, Mueller & Naylor, and I'm appearing on behalf of Steven A. Sillman, the presiding judge of the Monterey County Municipal Court.

JUDGE WHYTE: Good afternoon everybody. Is it your understanding that no one from the Justice Department is going to appear?

MR. AVILA: Your Honor, I spoke to them at about 12:00, and they indicated that they were not going to be here. They might be submitting a letter to the Court which might request any kind of inquiries from the Court that they could respond to.

But as far as I know, they're not going to make an appearance today.

JUDGE WHYTE: And they've filed nothing?

MR. AVILA: I left my office at about 12:40, Your Honor, and there was nothing in my fax machine.

MS. LEONI: Your Honor, on that question, I'd like to offer that yesterday I had the same question. I asked my secretary to speak with the attorneys in the office here in San Jose and my secretary was informed that they had not filed a brief.

JUDGE WHYTE: Okay. Thank you for the report. I must say it seems, to me, very disappointing that we haven't heard from them.

* * *

MR. HOLLAND: We've tried to work with the statute. We've, in essence, been taking a passive role, a conservative role, in trying to proceed.

Due to the frustration that you see, we've got now the State of California suggesting that we're in a particular box, but we're stuck with the dilemma that we need to try and move ahead.

What the County is now proposing is in fact a more aggressive, more assertive, more proactive standard to try and resolve this issue.

We think that also involves some sort of judicial determination in regard to, first of all, the validity of any plan that the County may adopt. I'm not prepared to recommend we implement a plan, that the County implement a plan, simply because it may be precleared by the Department of Justice.

I think the *Miller* case does indicate that there would be folks that would have serious concerns about any plan that the County might devise, and we need to validate that plan before we attempt to implement.

JUDGE SCHROEDER: We don't have jurisdiction.

MR. HOLLAND: No, you do not, and I'm not proposing we submit it to this Court. This would be a separate action we would file subsequent to the adoption of the plan and the preclearance effort, that's correct.

JUDGE WHYTE: One reason I was kind of expecting and hoping the United States would be here is to get its view on what effect the *Miller* case has on what they will be doing as far as preclearance. One wonders, if you now submitted the ordinances that weren't precleared to the Department of Justice for preclearance, how they would approach that? Do you have any idea?

* * *

JUDGE WHYTE: Do you feel the *Miller versus Johnson* case raises some questions about the constitutionality of the plan that was approved as an interim emergency plan?

MR. HOLLAND: No, I do not, Your Honor.

JUDGE WHYTE: And the reason?

MR. HOLLAND: The reason is it was an interim remedy to deal with a specific situation. I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations. To the extent any other factor went in, it was entirely secondary. There's no question about that.

But I think that it was also necessary in order to resolve a particular problem that we were in at that time. We were looking at, quite frankly, again, looking at what the status quo ante is. Status quo ante is in a multi-district court system that would have had four minority, or four majority-minority districts in it, and this particular plan came up with a plan, or came up with a program, that was essentially, that had three majority-minority districts.

APPENDIX 9

Civil Action No. C-91-20559-RMW (EAI)

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PROF. BARBARA Y. PHILLIPS
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSE G. SANCHEZ and, DAVID SERENA
Plaintiffs,
v.
MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Defendants,
STEPHEN A. SILLMAN,
Intervenor,

Voting Rights Action
Three Judge Court

Circuit Judge Mary M. Schroeder
District Judge James Ware
District Judge Ronald M. Whyte

PLAINTIFFS' NOTICE REGARDING CONTINUING DISTRICT COURT'S JURISDICTION

As a result of discussions with the parties in this action, there has arisen a question as to whether this Court has any continuing jurisdiction to resolve any issues pending the appeal to the United States Supreme Court. The discussions occurred after Plaintiffs sought a stipulation to the filing of an amended complaint in this action to enforce Section 5 of the Voting Rights Act 42 U.S.C. § 1973 c. In order to address these questions, Plaintiffs are filing this memorandum.

Plaintiffs on November 30, 1995, filed a notice of appeal. Plaintiffs are appealing the interlocutory injunction filed by this Court on November 1, 1995. The appeal challenges only the implementation of a temporary court-ordered election plan for electing municipal court judges in the March 26, 1996, primary elections. The appeal does not challenge any aspects of the November 1, 1995, Order which are not related to the implementation of the temporary court-ordered election plan.[1] Thus, the District Court has continuing jurisdiction to address Plaintiffs' anticipated filing of the First Amended Complaint, any issues related to the merits of this action, as well as, deciding Plaintiffs' Motion for Award of Attorney's Fees and Related Non-Taxable Costs

[1]There are only three questions listed in Appellants' Jurisdictional Statement: "1) Whether in an Action to Enforce Section 5 of the Voting Rights Act, a District Court can Order as a Temporary Court-Ordered Election an At-large Election System, Which has not Received Section 5 Preclearance . . .; 2) Whether in an Action to Enforce Section 5 of the Voting Rights Act, a District Court can Order as a Temporary Court-Ordered Election Plan, an Election Plan . . . Which does not Comply with the Standards Applicable to Court-Ordered Election Plans; 3) Whether in an Action to Enforce Section 5 of the Voting Rights Act, There are Extreme Circumstances Justifying the Use of a Temporary Court-Ordered Election Plan . . . Which has not Received Section 5 Preclearance." Jurisdictional Statement at i (filed January 29, 1996).

which was filed on May 4, 1995, and heard on June 16, 1995.

Such continuing jurisdiction in the present action is supported by applicable precedent. In *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498 (S.D.Cal. 1992), *affirmed*, 38 F.3d 402 (9 Cir.), a district court concluded that it had continuing jurisdiction to address other merit-related issues while a preliminary injunction was appealed:

> "A well-recognized exception to this general rule of divestiture of jurisdiction is appeals from orders granting or denying jurisdiction pursuant to 28 U.S.C. Sec. 1292(a)(1). In an early case, the Ninth Circuit concluded an appeal from an interlocutory order does not divest the district court of jurisdiction to continue with other phases of the trial. *Phelan v. Taitano*, 233 F.2d 117 (9th Cir. 1956). Numerous other courts also have concluded an appeal of a preliminary injunction does not prevent the district court from proceeding with the action on the merits. *Shevlin v. Schewe*, 809 F.2d 447 (7th Cir. 1987); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976); *Thomas v. Board of Educ.*, 607 F.2d 1043, 1047 n. 7 (2d Cir. 1979); *Watkins v. United States Army*, 541 F.Supp. 249, 252 (W.D.Wa. 1982); *Robb Container Corp. v. Sho-Me Co.*, 566 F.Supp. 1143, 1157 (N.D.Ill. 1983); *United Parcel Svc. v. United States Postal Serv.*, 475 F.Supp. 1158 (E.D.Pa. 1979). . . ."

Id., 788 F.Supp. at 1511. *See* 9 Moore's Federal Practice ¶ 203.11 (Revision Sept. 1995)

("However if, an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters

not involved in the appeal. Thus, the district court is not divested of jurisdiction to award costs as to matters which are not involved in the appeal, nor does an appeal from an order granting or denying a preliminary injunction divest the district court of jurisdiction to proceed with the action on the merits.") (footnotes omitted). *See also Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1994) (pending appeal of interlocutory orders did not divest jurisdiction from the district court to decide motion for attorney's fees for other orders which were not the subject of the appeal). However, jurisdiction will be divested if the appeal raises issues which would affect the ability of the district court to adjudicate the merits. *See, e.g., Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992) (where appeal of an interlocutory qualified immunity issue divested jurisdiction from the district court, unless the court certified that the appeal was frivolous or was waived). The exception noted in *Chuman* is not applicable to the *Lopez* litigation. The resolution of the appeal in the *Lopez* will not affect the ability of this Court to adjudicate any pending motions or other merit-related issues anticipated to be raised by the Defendants or the Intervenor.

In conclusion, this Court has continuing jurisdiction to adjudicate the pending attorney's fees motion filed by the Plaintiffs, and other issues related to this Section 5 enforcement action.

Date: February 8, 1996

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

Pls. Notice - C-91-20559 RMW (EAI)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Plaintiffs' Notice Regarding Continuing District Court's Jurisdiction was mailed on February 8, 1996, to the following counsel and addresses:

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DATED: February 8, 1996

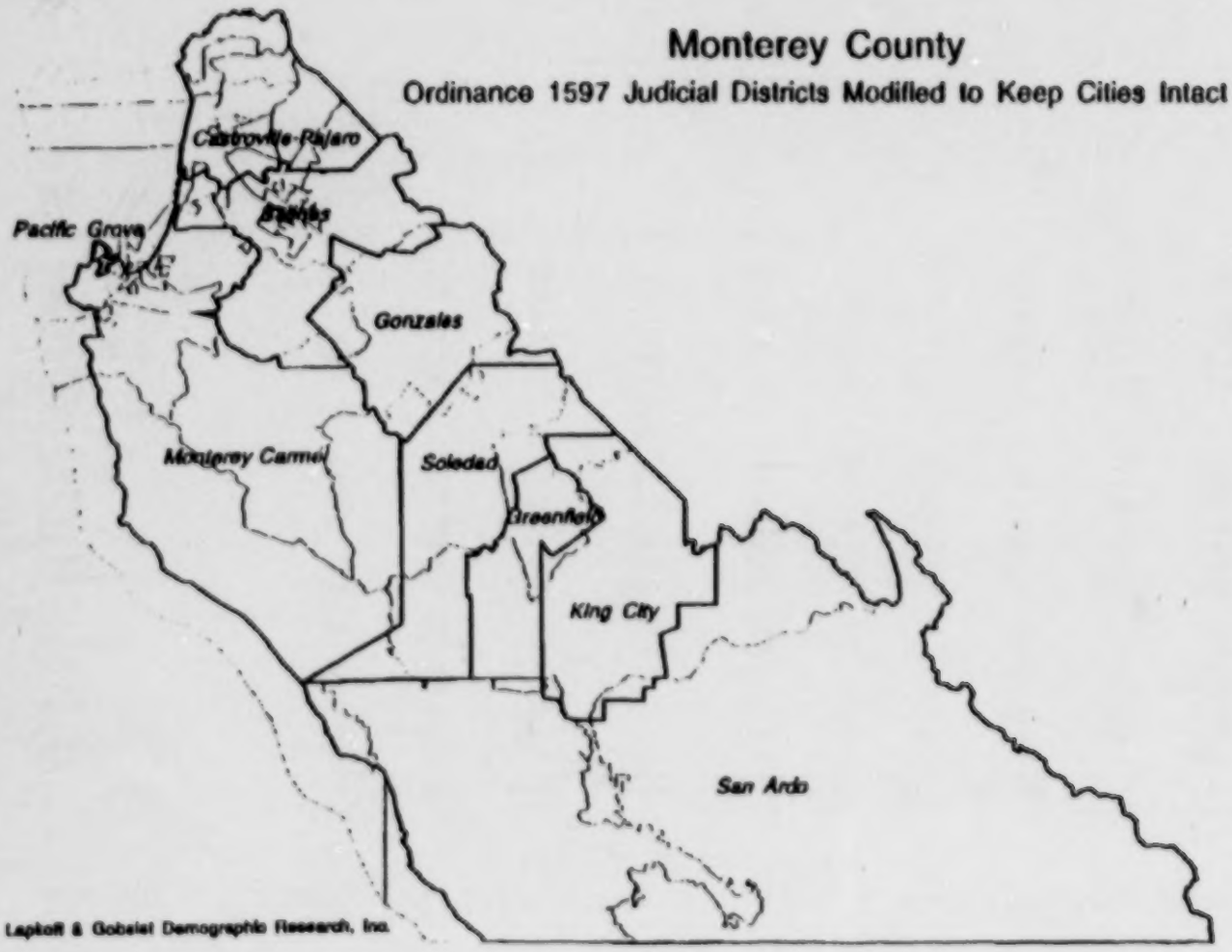
JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

APPENDIX 10

Monterey County

Ordinance 1597 Judicial Districts Modified to Keep Cities Intact



Lapkoff & Gobalet Demographic Research, Inc.

Estimate of Ordinance 1597 Judicial District Populations, Modified to keep Cities Intact
1990 U.S. Census Data

	Castroville-Pajaro	Gonzales	Greenfield	King City	Monterey-Carmel	Pacific Grove	Salinas	San Ardo	Soledad Including All	Soledad Excluding Prison	Total
Total Population	39,878	7,880	8,987	10,842	105,730	16,131	146,858	3,891	15,461	9,465	355,660
Latino	41%	76%	74%	61%	9%	6%	40%	26%	63%	80%	33%
White (NH)	52%	18%	22%	36%	71%	87%	43%	87%	19%	14%	52%
API	5%	5%	2%	1%	8%	5%	10%	2%	2%	4%	8%
Black	1%	1%	1%	1%	11%	1%	6%	4%	14%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	1%	0%	0%
Population 18+	27,472	4,960	5,577	7,123	83,431	13,287	100,988	2,798	12,072	6,076	257,709
Latino	36%	71%	71%	57%	8%	5%	35%	21%	56%	76%	28%
White (NH)	55%	21%	26%	40%	74%	88%	48%	71%	22%	18%	57%
API	6%	6%	2%	1%	8%	5%	11%	2%	2%	4%	8%
Black	1%	1%	1%	1%	10%	1%	6%	4%	18%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	2%	0%	0%
Citizens 18+ (Estimated)											
Latino	23%	54%	51%	36%	6%	5%	23%	10%	39%	62%	17%
White (NH)	68%	37%	44%	60%	78%	90%	60%	81%	31%	31%	68%
API	6%	7%	3%	2%	5%	4%	9%	2%	2%	4%	7%
Black	2%	1%	1%	1%	10%	1%	7%	5%	26%	2%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%	1%	2%	0%	1%	1%
Other (NH)	0%	0%	0%	0%	0%	0%	0%	0%	2%	0%	0%

Columns may not appear to total 100 percent because of rounding.

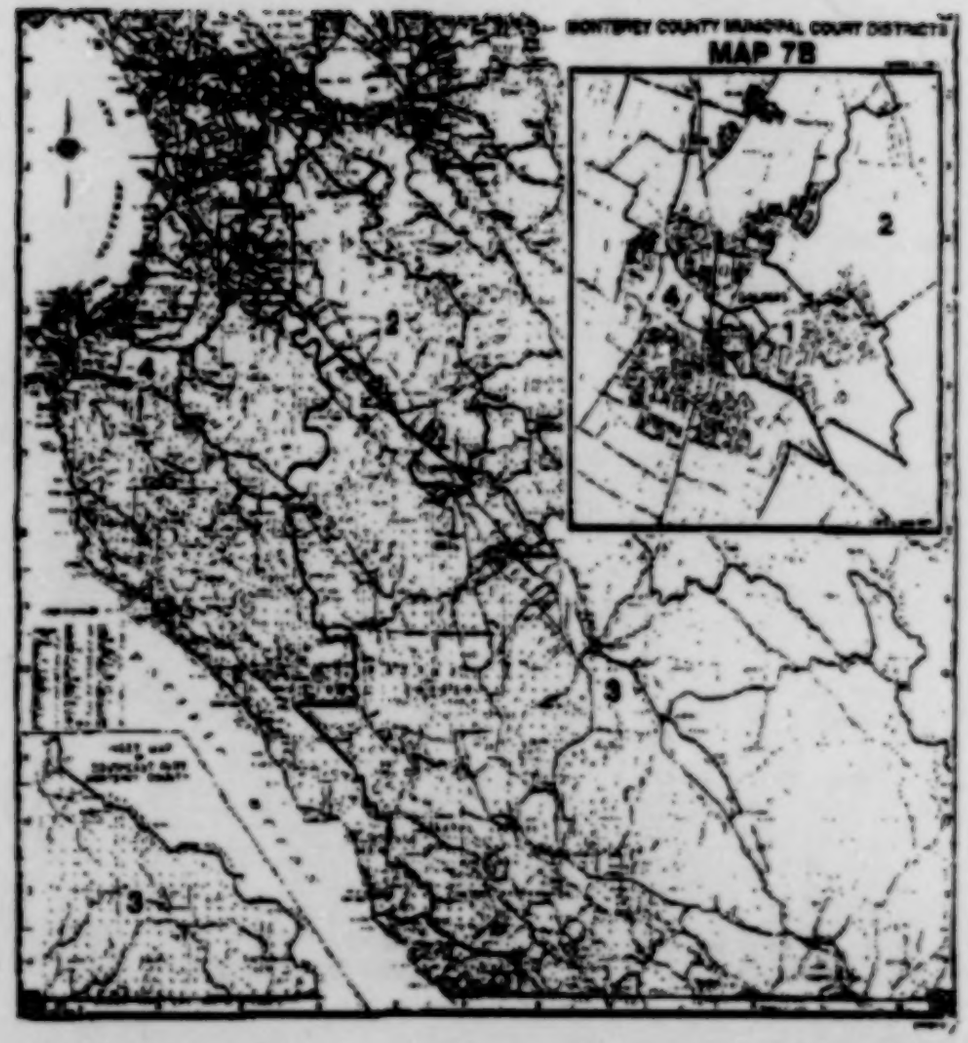
NH = Non-Hispanic

IEA = American Indian, Eskimo, or Aleut

API = Asian or Pacific Islander

Lapkoff Gobalet Demographic Research, Inc.

APPENDIX 11



Full size copy of map has been lodged with the Clerk of the Court.

Monterey County Municipal Court Districts
Summary Table
Plan 7B

	1	2	3		4	Total
			Including All	Excluding Prison		
Total Population	35,691	34,547	31,630	25,634	253,792	355,660
Latino	75%	74%	55%	59%	18%	33%
White (NH)	17%	17%	35%	37%	64%	52%
API	5%	7%	1%	2%	9%	8%
Black	2%	2%	8%	1%	8%	6%
IEA (NH)	1%	0%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%
Population 18+	22,220	21,797	22,836	16,842	190,854	257,709
Latino	69%	69%	49%	54%	16%	28%
White (NH)	22%	21%	37%	42%	68%	57%
API	6%	7%	1%	2%	9%	8%
Black	2%	2%	11%	2%	7%	6%
IEA (NH)	1%	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%
Citizens 18+ (Estimated)	12,950	12,649	16,049	11,313	170,088	211,735
Latino	52%	52%	30%	33%	11%	17%
White (NH)	37%	35%	52%	61%	74%	68%
API	7%	8%	1%	2%	7%	7%
Black	3%	3%	14%	2%	8%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%

NOTE: Latino percentages include Hispanic Blacks and Hispanic APIs. A district's Hispanic percentage may be one percentage point higher than a district's Latino percentage.

NH = Non-Hispanic
IEA = American Indian, Eskimo, or Aleut
API = Asian or Pacific Islander

Columns may not appear to total 100 percent because of rounding.

Largest District	36,256
Smallest District	31,630
Difference	4,626
Ideal District	35,566
Division	13.0%

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